INDEX

CITATIONS

CASES:

STATUTES:

In the Supreme Court of the United States

OCTOBER TERM 1945

No. 1119

CITY OF FRANKLIN, PETITIONER

v.

COLEMAN BROS. CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR COLEMAN BROS. CORPORATION IN OPPOSITION

OPINIONS OF THE COURT

The City of Franklin by its petition for *certiorari* seeks to have reviewed the order or judgment of the Court of Appeals for the First Circuit affirming the judgment of the District Court awarding the respondent Coleman Bros. Corporation damages in the sum of twelve thousand two hundred fifty-seven dollars ($12,257) with the proviso that interest be added thereto and included in the final judgment. The opinion of the District Court is reported in 58 Fed. Supp. 551 and of the Court of Appeals in 152 Fed. 2d 527.

JURISDICTION

The respondent, Coleman Bros. Corporation, filed its complaint in United States District Court for the District of New Hampshire on May 17, 1944 to recover back money paid under protest to the petitioner, City of Franklin, for taxes alleged to have been illegally assessed in 1940 and 1941. Coleman Bros. Corporation is a corporation organized under the laws of the Commonwealth of Massachusetts with its principal place of

business at Boston, and the City of Franklin is a municipal corporation organized under the laws of the State of New Hampshire. The judgment of the District Court was entered on December 2nd, 1945. The City of Franklin appealed from the judgment on the ground that it was entitled to judgment as a matter of law and the Coleman Bros. Corporation for the reason that interest was not allowed on the damages recovered. The judgment of the United States Court of appeals was rendered December 13, 1945 and on March 13, 1946 an order was entered in this Court extending the time within which to file the petition for certiorari to and including April 15, 1946. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the act of February 13, 1925.

THE QUESTIONS PRESENTED

The petitioner, City of Franklin, contends that the United States Court of Appeals for the First Circuit erred in rejecting the petitioner's contentions that,—

I. The statutory remedy (N. H. R. L., Ch., 77, Sects. 13, 14) for abatement of taxes is exclusive.

II. The action is not maintainable because the City of Franklin does not consent to be sued, and because the statutes do not provide for suits as presented in the instant case.

III. The payments made by the respondent, Coleman Bros. Corporation, to the petitioner, City of Franklin, were made voluntarily.

IV. The respondent, Coleman Bros. Corporation, is guilty of laches.

V. The respondent, Coleman Bros. Corporation, is not entitled to interest.

STATUTES INVOLVED

The pertinent provisions of the New Hampshire statutes relating to the assessment, abatement and collection of taxes (R. L., Ch. 74, Sects. 1, 3; Ch. 75, Sects. 1, 6, 13; Ch. 77, Sects. 11, 13, 14; Ch. 80, Sects. 4, 6, 8) are set out in the appendix. Other statutes, State and Federal, are referred to in the brief.

STATEMENT OF THE CASE

The petitioner, City of Franklin as of April 1, 1940 assessed taxes against Coleman Bros. Corporation in the sum of $7,700, and as of April 1st, 1941 in the sum of $4,557, for machinery and equipment situated on land acquired by the United States for the Franklin Falls Flood Control Project. The Congress by the Flood Control Act of 1936 (49 Stat. 1570) and the amendment thereto, enacted June 28, 1938 (52 Stat. 1216) authorized the construction of "a system of flood control reservoirs in the Merrimack River Basin," and specifically the construction of a flood control dam and reservoir at Franklin Falls on the Pemigewasset River, an important tributary of the Merrimack River. The State of New Hampshire to open the way for the construction of these projects (Laws 1939, Ch. 149, Sect. 1) gave consent "in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, to the acquisition by the United States by purchase, condemnation or otherwise, of any land or interests in land within this state required for use in connection with the construction, maintenance and operation of" various flood control projects, including the Franklin Falls Reservoir, subject only to the provision that the State "shall retain concurrent jurisdiction with the United States in and over any such lands to the extent that all civil and criminal process issued under the authority of this state may be executed thereon ***." (R. L. Ch. 4, Sect. 1.)

Coleman Bros. Corporation under a written agreement dated September 6, 1939 undertook the construction of the flood control dam at Franklin Falls and were assigned a work area, including the dam site, consisting of nine tracts or parcels of land to which the United States had acquired title. Within this work area the plaintiff constructed prior to April 1, 1940 an office building and repair shop and other structures, and also an enclosure set off by a wire fence in which its equipment was stored when not in use. On April 1, 1941 the plaintiff was still engaged in construction of the dam within the work area but the quantity of equipment had been reduced. Coleman Bros. Corporation, a foreign corporation, had no place of business within the confines of New Hampshire except upon this flood control reservation. (R. 102-4).

This reservation is within the bounds of the City of Franklin and on April 1, 1940, Mr. Gerry, one of defendant's assessors, called at the office and left with the manager the usual form for inventory of taxable property requesting that it be filled out and returned to the assessors. Instead the form was forwarded to the Boston office from which it was returned to the assessors with a letter under date of May 2nd stating that the property was not taxable. Thereupon, the State Tax Commission by letter dated May 3rd notified Coleman Bros. Corporation that its property was taxable and that it must return an inventory. Mr. Gerry again called for the inventory but was put off. He returned again on May 16th and was shown the buildings and equipment. Finally, an inventory was returned listing property to the value of $200,000 with a letter denying the jurisdiction of the assessors to impose the tax for the reason that the property "is on land owned or controlled by the United States of America." (R. 107). The tax inventory also contained the following protest,—

> "This return is made to avoid any possible penalties and protesting against the levying of any taxes as this property is not subject to taxation in Franklin." (Ex. 18).

The assessors notwithstanding this protest assessed taxes against the plaintiff aggregating $7,700 and in due course issued a warrant to the tax collector for the collection of this and other taxes. The tax collector in August 1940 notified the Coleman Bros. Corporation of the tax, and demanded payment (R. 110). The tax was paid under protest on November 22nd. The protest among other things stated,—

> "This payment is made under protest and for the purpose of saving the company from any penalties, the personal property on which the tax was levied being located on real estate which is the property of the United States and said personal property not being taxable by said City, and we hereby expressly disaffirm and deny any right of said City to tax said property." (R. 108, Ex. 19A)

In the following year, 1941, this procedure was repeated. The assessment against the Coleman Bros. Corporation amounted

to $4,557 which was paid under protest as of November 17th, 1942. (R. 108-10).

In 1942 the assessors again demanded that the respondent file an inventory of its property and an inventory was again filed under protest. However, the inventory was returned by the assessors with a letter dated May 14th, 1942, stating that they had been advised by the Tax Commission that,—"New Hampshire did not protect itself when they gave the federal government the right to acquire property by reserving to itself the right to tax." (Ex. 27A; R. 77).

The District Court found that the property of the Coleman Bros. Corporation had its situs within the flood control reservation and that the City of Franklin was without jurisdiction to levy a tax thereon. (58 F. Supp. 553). The District Court also found,—

> "The testimony tended to show and I find as a fact that the plaintiff complied with the requests of the assessors of the City of Franklin in filing its inventory and paying the taxes assessed prior to December 1 each year under protest to avoid the penalties prescribed in Chapter 75, section 13, of N. H. R. L., relating to doomage, the payment of ten per cent interest or the possible distraint and sale of its property as prescribed in Chapter 80 of the N. H. R. L." (58 F. Supp. 553).

The District Court held that the Coleman Bros. Corporation is entitled to recover the amounts paid to the City of Franklin, a total of $12,227, but without interest.

ARGUMENT

In *Scribner* v. *Wikstrom*, 93 N. H. 17 the Court in construing Laws 1939, Ch. 149, Sect. 1 (R. L., Ch. 4, Sect. 1) declared that,—"Reservation of the power to serve process does not imply a reservation of the power to tax." The petitioner, City of Franklin, now concedes that it had no jurisdiction to tax the personal property belonging to Coleman Bros. Corporation and having its situs upon land belonging to the United States. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647. The City of Franklin thus admits that the taxes were illegally

assessed but contends that the respondent, having paid the taxes, cannot maintain this action to recover back its money. This contention is elaborated in several propositions advanced in support of this petition. (Pet. 5). These contentions involve primarily questions of New Hampshire law and procedure and will be considered in the order stated in the petition.

I. *The Statutory Remedy for Abatement of Taxes Is Not Exclusive Where the Taxes Are Assessed Without Jurisdiction of the Person or Property.* The respondent did not petition under Revised Laws, Chapter 77, Sects. 13 and 14 for abatement of the taxes assessed against it. Section 13 authorizes the selectmen or assessors upon written application for a good cause shown to abate any assessments assessed by them. Section 14 provides that upon neglect or refusal "to abate, any person aggrieved * * * may within six months after notice of such tax, and not afterwards, apply by petition to the superior court in the county, which shall make such order thereon as justice requires." This remedy is usually invoked for over-assessment or other irregularity and the relief may include judgment for such portion of the taxes paid as may have been improperly assessed. *Rollins* v. *Dover,* 93 N. H. 448. In cases involving only over-assessment, the statutory remedy is exclusive. *Edes* v. *Boardman,* 58 N. H. 580. It is not exclusive where the assessment is made without jurisdiction of either the person or the property against which the tax is assessed. In the present case the District Court found that the property taxed "had its situs on land belonging to the United States," and ruled that "the assessors of the City of Franklin had no jurisdiction over the plaintiff corporation or its property." (58 F. Supp. 551). The assessments were made without jurisdiction and were therefore void. *Wynn* v. *Boston,* 281 Mass. 245; 183 N. E. 528. Thus in *Winchester* v. *Stockwell,* 75 N. H. 322, where the Town sought to recover taxes assessed against real estate situated within the Town but belonging to a resident of Vermont, the assessment was held invalid as a judgment *in personam,* the Court said,—

> " 'A judgment without service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal

> liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is as true in the case of an assessment against a non-resident of such a nature as this one, as in the case of a more formal judgment. The jurisdiction to tax exists only in regard to persons and property or upon business done within the state and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question.' *Dewey* v. *Des Moines,* 173 U. S. 193, 203."

In the present case jurisdiction was lacking, not only over the person but also over the property. The assessment was not valid either as a judgment *in personam* or *in rem*. In *Surplus Trading Corporation* v. *Cook,* 281 U. S. 647, upon facts analogous to the present case the assessment was held invalid. The action was brought by Cook as tax collector for Pulaski County, Arkansas, to collect taxes assessed against personal property stored upon a military reservation. Among other contentions, Cook maintained that as the Trading Corporation had failed to apply for abatement to the State Board of Equalization "as required by Act 477 of Acts of Arkansas for 1919," "the courts are powerless to give * * * any relief." (281 U. S. 648). In rejecting the respondent's various contentions, this Court said,—

> "The property attempted to be taxed consisted of a large quantity of woolen blankets which the defendant, a New York concern, purchased from the United States at an advertised sale a few days before the day fixed by the state law for listing personal property for taxation, and which in much the greater part was on that day in the army storehouses within Camp Pike awaiting shipment therefrom. (281 U. S. 650).
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> "The question is not an open one. It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the state passes, in virtue of the constitutional provision,

to the United States, thereby making the jurisdiction of the latter the sole jurisdiction. (281 U. S. 652).

* * * * * *

"For the reasons which have been stated we are of opinion that the supreme court of the state erred in holding that her tax laws could be applied to personal property within Camp Pike consistently with s. 8, cl. 17, of article 1 of the Constitution, and therefore that the judgment of that court must be reversed." (281 U. S. 657).

The New Hampshire statutes do not authorize the assessment of taxes against persons or property without the jurisdiction. The cases, *Nottingham* v. *Company,* 84 N. H. 421, *Canaan* v. *Enfield Village Fire District,* 74 N. H. 8 and *Larkin* v. *Portsmouth,* 59 N. H. 26, relied upon by petitioner, are distinguishable upon the facts. However, if these statutes were held to apply either to the respondent while doing business upon the flood control reservation or to its personal property while situated there, the statutes might be deemed repugnant to s. 8, cl. 17 of article 1 of the Federal Constitution. But the statutes have not been construed to extend so far, and this question is not presented. The authorities are clear that the statutory proceeding for abatement is not the exclusive remedy when as here there was no jurisdiction to impose any tax. The general rule that the statutory remedy must be invoked does not apply where the assessment is void. The law is clearly stated and the authorities marshalled in the opinion of the court below. See, *City of Franklin* v. *Coleman Bros. Corp.,* 152 F. (2d) 527, 530.

II. *The Action Is Maintainable Although the City of Franklin Has Not Consented to Be Sued and the Statutes Do Not Expressly Authorize Such Actions.* The petitioner as a municipal corporation and a sub-division of the State of New Hampshire claims immunity to suit without express statutory authorization. But the immunity of the state to suit does not extend to cities and towns. Actions *ex contractu* and *ex delicto* have been maintained against cities and towns, subject only to limitations arising out of their peculiar powers. In no case has an action *ex contractu* been dismissed because of immunity

to suit. In *Rhobidas* v. *Concord,* 70 N. H. 90, the Court, in rejecting defendant's contention that it shared the immunity of the state to suit, after reviewing the decisions, said,—

> "If towns were mere divisions of the state, and could not be sued without authority from the legislature, many of these actions would have failed."

See also, *Lucier* v. *Manchester,* 80 N. H. 361.

No statutory authority is necessary to maintain this action to recover money illegally extorted by the petitioner from the respondent. The money was had and received by petitioner under circumstances giving rise to an implied promise to repay. *Eaton* v. *Noyes,* 76 N. H. 52. The petitioner ought not to be allowed to profit by its own wrong.

III. *The Payments Made by Coleman Bros. Corporation to the City of Franklin Were Not Voluntary.* This contention, like the other contentions raised by the petitioner, was exhaustively considered by the court below. The District Court found that the respondent filed its inventory and paid the tax prior to December each year under protest "to avoid the penalties prescribed in Ch. 75, Sect. 13 * * * relating to doomage and the payment of ten per cent interest or the possible distraint and sale of its property." (58 F. Supp. 551). The provisions of New Hampshire Revised Laws, Chapter 75, were printed in full upon the back of the form for inventory presented by the petitioner's assessors to the respondent. Section 13 of Chapter 75 provides that "if any person or corporation shall wilfully omit to make and return such inventory * * * the selectmen or assessors shall ascertain, in such way as they may be able, and as nearly as practicable, the amount and value of the property for which the person or corporation is taxable, and shall set down to such person or corporation, by way of doomage, four times as much as such property would be taxable if truly returned and inventoried." The respondent filed each inventory only upon the insistence of petitioner's assessors and with knowledge of the risks involved if they failed to comply with the demand. This clearly appeared from the protest and accompanying letter, denying jurisdiction and stating that the return or inventory was filed "to avoid any possible pen-

alties." (R. 70, Ex. 18). The taxes were paid under protest in November each year, after notice from the tax collector. (R. 110). In each protest the respondent denied the authority of the petitioner to levy the tax and stated that the tax was paid "for the purpose of saving the Company from any penalties." (R. 108). Interest at the rate of ten per cent per annum from December 1st was automatically imposed by the statute as a penalty for non-payment. (R. L., Ch. 77, s. 11). The property of non-residents is subject to distraint by the tax collector without notice. (R. L., Ch. 80, s. 4). The tax collector, under the power reserved to the state to serve civil and criminal process (R. L., Ch. 4, s. 1) could enter upon the federal reservation and distrain respondent's property. Each warrant issued to the tax collector directed him to collect the taxes according to the list annexed thereto, which included the taxes assessed against the respondent and specifically commanded him if any person or corporation after written notice of the tax neglected or refused "for the space of fourteen days to pay such tax" "to collect the same by distress and sale of the goods of such person or corporation." See, copies of tax warrants filed as exhibits. The petitioner at all times evinced a purpose to collect the tax. The finding of the District Court that the respondent filed the inventories and paid the taxes to avoid the penalties "relating to doomage and the payment of ten per cent interest, or the possible distraint and sale of its property," is fully warranted by the evidence. The result reached in this case legally follows. *Kirchner* v. *Pittsfield,* 312 Mass. 342, 44 N. E. 2d 634; *National Metal Edge Box Co.* v. *Readsboro,* 94 Vt. 405, 111 Atl. 387. This Court has repeatedly held that where taxes are paid "not voluntarily but under legal compulsion," they may be recovered back if illegally assessed, in appropriate proceedings. *Atchison, T. & S. F. R. Co.* v. *O'Connor,* 223 U. S. 285.

IV. *The Respondent, Coleman Bros. Corporation, Is Not Estopped by Its Own Conduct or Guilty of Laches.* The respondent has maintained a consistent course throughout the proceedings resulting in this action. The petitioner, having illegally extorted money from the respondent, cannot be heard to complain of the delay in instituting suit for it could

at all times have corrected the situation by returning the money. The petitioner's assessors were advised in 1942 that they did not have authority to assess respondent's property, but the petitioner apparently took the view that the respondents could not recover back the moneys paid because the statutory remedy by petition for abatement was exclusive (R. 78) and has persisted in this position to the present time. The suggestion that in New Hampshire it is unnecessary "to pay a tax in order to find out what a taxpayer's rights are" (Pet's. Brief 13) cannot be accepted literally. While a taxpayer may apply for abatement of taxes at any time within six months after notice of the tax, he is liable for interest at the rate of ten per cent, if the tax is held valid. Furthermore, the filing of the petition for abatement does not relieve the tax collector from the mandate contained in the warrant to collect the tax. The duty imposed upon the tax collector to collect the taxes committed to him is not only mandatory, but the distraint must be made within one year from October first following the assessment. (R. L. Ch. 80, Sect. 6). The tax collector cannot legally await the outcome of proceedings for abatement but must proceed with the collection of the tax and, if necessary, by distraint. This he would most certainly have done in the case of respondent whose property was gradually being moved beyond his reach. The respondent, irrespective of the proceedings instituted to determine the validity of the tax, had no choice but to pay the tax or face the distraint of its property for non-payment. We submit that the defense of laches is without merit.

V. *The Respondent Coleman Bros. Corporation Is Entitled to Interest.* The petitioner has advanced no good reason why it should not pay interest upon the money wrongfully collected from the respondent. It has had the use of the money and should pay for it. Interest has uniformly been allowed at six per cent (R. L., Ch. 367, s. 1) on taxes paid under protest and recovered back. The rule was declared in *Boston & Maine Railroad* v. *State*, 63 N. H. 571, and *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 348, and has been followed without question in numerous cases, including *Phillips Exeter Academy* v. *Exeter*, 92 N. H. 473 and *Sisters of Mercy* v. *Hooksett*, 93

N. H. 301. The form of the proceeding to recover back taxes paid under protest does not affect the right to interest as the legal and equitable considerations are not changed.

There is no conflict between the decision of the Court of Appeals and the decisions of the New Hampshire Supreme Court. The decision is in conformity with the interpretation placed upon the statutes by the New Hampshire Supreme Court in *Scribner* v. *Wikstrom,* 93 N. H. 17 and other cases, and also is consistent with the provisions of section 8, clause 17, Article 1 of the Federal Constitution. We respectfully submit that the petition for *certiorari* ought to be denied.

Respectfully submitted,

ROBERT W. UPTON,
Attorney for Respondent.